**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

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| BROCK STONE, et al.,<br><br>Plaintiffs,<br><br>vs.<br><br>DONALD J. TRUMP, et al.,<br><br>Defendants. | Case No. 1:17-cv-02459-GLR<br><br>Hon. George Levi Russell, III |

**PLAINTIFFS' RESPONSE TO**
**DEFENDANTS' MOTION TO STAY THE PRELIMINARY INJUNCTION**
**AND REQUEST FOR EXPEDITED RULING**

Plaintiffs respectfully submit this Response to Defendants' Motion to Stay the Preliminary Injunction and Request for Expedited Ruling (ECF 234). In light of the Supreme Court's order staying the preliminary injunctions in *Karnoski* and *Stockman*, Plaintiffs do not oppose a stay of the nationwide effect of this Court's preliminary injunction pending appeal. However, Plaintiffs do oppose any stay of the injunction as applied to a subset of named Plaintiffs who have made a strong showing of imminent and irreparable harm: Niko Branco, John Doe 2, Ryan Wood, Airman First Class Seven Ero George, and Petty Officer First Class Teagan Gilbert. After investing significant time and effort to satisfy the military's standards, these individual Plaintiffs are all on the cusp of being able to enlist in the military or commission as officers, but they will lose that opportunity if the Implementation Plan's new accessions policy takes effect.

The Supreme Court had no reason to consider whether the government had shown a stay was warranted in light of the specific circumstances surrounding any individual plaintiff. Plaintiffs respectfully ask the Court to continue enforcing the preliminary injunction with respect

to these Plaintiffs so they may complete the process of enlisting and commissioning, which would allow them to receive the protections provided to current service members under the Implementation Plan's grandfathering provision. Although this narrow relief would not fully protect the Plaintiffs from the harm caused by Defendants' facially discriminatory policy, it would mitigate the most severe and immediate effects. Because Defendants cannot show that a stay is warranted with regard to these five individuals, such a stay should not issue.[1]

**THIS COURT HAS DISCRETION TO STAY ONLY THE NATIONWIDE SCOPE OF THE PRELIMINARY INJUNCTION.**

Defendants assert that the Supreme Court's action "must result in a stay of this Court's preliminary injunction, in its entirety." ECF 234 at 4; *see id.* at 5–6. Defendants are incorrect. The government's stay applications to the Supreme Court focused extensively on staying the nationwide aspect of the preliminary injunctions issued in *Karnoski* and *Stockman*. *See, e.g.*, Part I and II Headings of the Karnoski Stay Appl., at 19, 27 (arguing that two of the three stay factors would be satisfied only "if the court of appeals affirms the injunction *and its nationwide scope*." (emphasis added)). Although the government alternatively proposed—in passing—a narrower stay that excluded the individual plaintiffs, *see id.* at 3, the plaintiffs responded by arguing that anything short of a continued nationwide injunction would cause harm; thus, they did not propose a stay of the nationwide scope of the injunction with exceptions for individual plaintiffs. *See* Karnoski Stay Appl. Opp'n at 33, No. 18A-625 (S. Ct. 2018) ("Anything less than a policy-wide injunction . . . threaten[s] Plaintiffs with actual harm."); *id.* at 38 ("Narrowing the

[1] Defendants incorrectly assert that in granting a stay of the injunctions in *Karnoski* and *Stockman*, "the Supreme Court considered the same factors the district court must consider here." ECF 234 at 5. To the contrary, the courts of appeals require a litigant to demonstrate a likelihood of success on the merits, ECF 234 at 4, while the Supreme Court requires only "a fair prospect that a majority of the Court will conclude that the decision below was erroneous." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009).

injunction to the individual Plaintiffs would fail to provide complete relief."); Stockman Stay Appl. Opp'n at 38, No. 18A-627 (S. Ct. 2018) ("[T]he harms inflicted on Respondents by the ban cannot be remedied by narrowing the injunction to apply only to them.").[2]

The Supreme Court was only presented with the question whether to impose a blanket stay or no stay at all. Accordingly, and contrary to Defendants' argument, this Court is not prohibited from considering whether, on the facts of the case before it, there should not be a stay applied to specific individual Plaintiffs. *See In re Grand Jury Subpoena*, 870 F.3d 312, 318–19 (4th Cir. 2017) ("[A] prior case 'is not a binding precedent' for questions 'not . . . raised in briefs or argument nor discussed in the opinion of the Court.'"); *see also Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

**CERTAIN NAMED PLAINTIFFS IN THIS CASE PRESENT UNIQUE CIRCUMSTANCES JUSTIFYING A NARROW EXEMPTION FROM THE STAY THAT THE COURT SHOULD OTHERWISE ENTER.**

Although a nationwide injunction is the only remedy that will provide *complete* relief to Plaintiffs, permitting its enforcement as to five of the named Plaintiffs would significantly mitigate Plaintiffs' irreparable harm. The Supreme Court did not have an opportunity to consider the individualized circumstances facing Plaintiffs in this case were they to be subject to a stay of the injunction. And Defendants cannot articulate any injury they would suffer from allowing these specific individuals to complete the process of enlisting or commissioning after

[2] Defendants' argument to the contrary is misleading. *See* ECF 234 at 6–7. The *Karnoski* and *Stockman* oppositions to the stay applications made only generalized assertions of harm that *all* similarly situated transgender individuals would face under a stay. *E.g.*, *Karnoski* Stay Appl. Opp'n at 30 ("Plaintiffs *and other transgender persons* would suffer serious irreparable injury from a stay." (emphasis added)).

having taken steps in reliance on both the Department of Defense and this Court's injunction to prepare to do so. Exempting them from a stay of the injunction would merely provide the same protections that the Implementation Plan already provides to current service members through the grandfathering provision.

### A. Plaintiffs Branco, Doe 2, Wood, George, and Gilbert Will Suffer Irreparable Harm if They Are Subject to the Stay.

The circumstances of Plaintiffs Branco, Doe 2, Wood, George, and Gilbert show their entitlement to the continued protection of the preliminary injunction. Absent exemption from the stay, there is no question that they will suffer immediate, irreparable harm.

#### *1. Irreparable Harm to Plaintiffs Branco, Doe 2, and Wood*

Under the Open Service Directive, Mr. Branco, Mr. Doe 2, and Mr. Wood are eligible to enlist because: (i) they have been stable without clinically significant distress or impairment as the result of gender dysphoria for more than 18 months; (ii) they have completed all medical treatment associated with gender transition, been stable in their gender for more than 18 months, and been stable on cross-sex hormone therapy post-gender transition for more than 18 months; and (iii) more than 18 months have elapsed since the date of their most recent transition-related surgery and no functional limitations or complications persist, nor do they require any further surgery. Doe 2 Decl. ¶ 2 (attached hereto); ECF 139-32 (Branco) ¶¶ 7–9, 13, 16; ECF 139-36 (Wood) ¶ 10. If the injunction is stayed, all of them will be prohibited from enlisting merely because they have undergone surgery related to gender transition. *See* ECF 120-1 at 2 (Implementation Plan, disqualifying all individuals who "have undergone gender transition"); Branco Decl. ¶ 13 (attached hereto); Doe 2 Decl. ¶ 8; ECF 139-36 (Wood) ¶ 12.

*2. Irreparable Harm to Plaintiffs George and Gilbert*

Airman First Class George and Petty Officer Gilbert plan to apply for commissions immediately following the completion of their educational programs in August 2019. George Decl. ¶ 5 (attached hereto); Gilbert Decl. ¶ 3 (attached hereto). But they are in the dark as to whether the Implementation Plan allows them to do so, given Defendants' statement that "DoD has not yet formed a policy regarding commissioning." ECF 176 at 15 (citing Stephanie Barna Decl. ¶ 7). Moreover, Petty Officer Gilbert is approaching the age cut-off for certain officer programs (including her first choice in Space Operations); if she is unable to apply for a commission shortly after graduation, she risks losing her eligibility for these programs entirely, which would be a significant setback to her career. Gilbert Decl. ¶¶ 12–13. Airman First Class George is also approaching the age cut-off for applying for a commission. George Decl. ¶ 12.

**B. Defendants Fail to Show Entitlement to a Stay.**

*1. Defendants Will Not Suffer Irreparable Harm if These Five Plaintiffs Are Exempted from the Stay of the Injunction.*

Defendants bear the burden of establishing that exempting these five Plaintiffs from an otherwise complete stay of the injunction will cause Defendants irreparable harm. *Real Truth*, 575 F.3d at 346; *see* ECF 234 at 4. They do not even attempt to meet their burden. Moreover, the Implementation Plan *already* grants an exception to the Ban via a grandfather clause, which allows an unknown number of transgender individuals to remain in the military. ECF 120-2. Adding three individuals seeking to enlist and two already-serving individuals seeking to commission to the thousands of currently serving transgender individuals cannot conceivably cause irreparable harm to Defendants—particularly since four of the five Plaintiffs have completed their surgeries related to gender transition and will not require expenditure of government funds for further procedures, while any future surgery for Petty Officer First Class

Gilbert will be paid for out of pocket or by private insurance. ECF 139-32 (Branco) ¶ 9; ECF 140-1 (Doe 2) ¶ 14; ECF 139-36 (Wood) ¶ 6; George Decl. ¶ 3; Gilbert Decl. ¶ 7.

*2. The Equities Are in Plaintiffs' Favor.*

The equities also strongly favor exempting these five Plaintiffs. In reliance on this Court's decision to preliminarily enjoin the Transgender Service Member Ban, all five undertook significant efforts to enlist. As just one example, Mr. Wood has postponed pursuing an alternative career as a firefighter, because his first and foremost goal is to serve his country in the military. ECF 139-36 (Wood) ¶ 16. He has been working to enlist since the accessions ban was lifted at the beginning of 2018, including repeated follow-up appointments with his recruiter and medical personnel to provide additional medical information, putting an alternative career on hold. *Id.* ¶¶ 8, 11. The other four Plaintiffs have similarly diligently pursued their careers in military service, which is a lengthy, iterative process that involves multiple visits with doctors and recruiters and extensive paperwork. For example, Mr. Branco has done everything his recruiter asked of him to meet the military's accession standards, at considerable personal expense. Branco Decl. ¶¶ 10–11; *see* Doe 2 Decl. ¶ 3; George Decl. ¶ 9; Gilbert Decl. ¶¶ 4–6.

**CONCLUSION**

In deference to the order the Supreme Court issued in related cases, Plaintiffs largely do not oppose the stay pending appeal Defendants seek here. But the Supreme Court's order does not require this Court to stay the preliminary injunction *in its entirety*, irrespective of the facts and circumstances of individual Plaintiffs before this Court. This Court should exercise its equitable discretion, tailor its stay to the facts of this case, and permit the preliminary injunction to remain in force as it applies to the very narrow circumstances of Plaintiffs Niko Branco, John Doe 2, Ryan Wood, Airman First Class Seven Ero George, and Petty Officer First Class Teagan Gilbert.

Dated: January 30, 2019

Respectfully submitted,

*/s/ Peter J. Komorowski*
Peter J. Komorowski

David M. Zionts*
Carolyn F. Corwin*
Mark H. Lynch (Bar No. 12560)
Augustus Golden*
Jeff Bozman*
Marianne F. Kies (Bar No. 18606)
Joshua Roselman*
Peter J. Komorowski (Bar No. 20034)
Mark Andrews-Lee*
Covington & Burling LLP
One CityCenter
850 Tenth St. NW
Washington, DC 20001
Telephone: (202) 662-6000
Fax: (202) 778-5987
dzionts@cov.com
ccorwin@cov.com
mlynch@cov.com
agolden@cov.com
jbozman@cov.com
mkies@cov.com
jroselman@cov.com
pkomorowski@cov.com
mandrewslee@cov.com

Mitchell A. Kamin*
Nicholas M. Lampros*
Covington & Burling LLP
1999 Avenue of the Stars, Suite 3500
Los Angeles, California 90067
Telephone: (424) 332-4800
Facsimile: (424) 332-4749
mkamin@cov.com
nlampros@cov.com

** Admitted pro hac vice*

Deborah A. Jeon (Bar No. 06905)
David Rocah (Bar No. 27315)
American Civil Liberties Union Foundation of Maryland
3600 Clipper Mill Road, #350
Baltimore, MD 21211
Telephone: (410) 889-8555
Fax: (410) 366-7838
jeon@aclu-md.org
rocah@aclu-md.org

Joshua A. Block*
Chase B. Strangio*
James Esseks*
Leslie Cooper*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: 212-549-2627
Fax: 212-549-2650
jblock@aclu.org
cstrangio@aclu.org
jesseks@aclu.org
lcooper@aclu.org

Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30th day of January, 2019, a copy of the foregoing was served via CM/ECF on all counsel of record.

*/s/ Peter J. Komorowski*

Peter J. Komorowski